



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

ELP

Docket No. 4441-00

29 September 2000

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

Ref: (a) 10 U.S.C.1552

Encl: (1) Case Summary
(2) Subject's Naval Record

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member of the Navy, applied to this Board requesting, in effect, that the reason for discharge and reenlistment code be changed, and that he be placed on the permanent disability retired list or, transferred to the Fleet Reserve under Temporary Early Retirement Authority (TERA).

2. The Board, consisting of Messrs. Lightle, Bishop and Pauling reviewed Petitioner's allegations of error and injustice on 7 September 2000 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Petitioner's application to the Board was filed in a timely manner.

c. Petitioner reenlisted in the Navy on 21 May 1993 for two years as an HM2 (E-5) and, on the following day he extended his enlistment for an additional three months. At the time of his reenlistment, he had completed more than 12 years of prior

active service. He was promoted to HM1 (E-6) on 16 November 1994 and extended his enlistment for an additional period of 24 months on 17 May 1995. He was awarded his second Navy Achievement Medal on 14 June 1995.

d. Petitioner served without incident until 14 October 1995 when the security officer at Naval Support Activity (NSA) Memphis, TN filed an incident report regarding his drunk and disorderly conduct at the NSA Hospital. Petitioner had picked up his wife, an HMC (E-7), at the airport upon her return from a four-month deployment. From the airport, he took his wife to the naval hospital to check-in. However, when they got to the hospital, Petitioner's wife told the duty officer that Petitioner was intoxicated and verbally abusive, she did not want to see him until he sobered up, and she would spend the night at the hospital's bachelor enlisted quarters.

e. On 19 October 1995, the command referred Petitioner to a counseling and assistance center (CAAC) for suspected alcohol abuse. The commanding officer (CO) was advised that Petitioner did not appear to be alcohol dependent or an alcohol abuser. However, he demonstrated poor judgment and irresponsibility in the use of alcohol. It was recommended that he be returned to full duty, held accountable for his actions, and placed on a local rehabilitation program. Formal treatment was not indicated at that time. Petitioner showed good motivation towards CAAC's recommendations and good potential for further service.

f. On 1 November 1995, Petitioner received nonjudicial punishment for insubordination, failure to obey a lawful order, and drunk and disorderly conduct. Punishment imposed was a reduction in rate to HM2 (E-5). Thereafter, a special enlisted performance evaluation was submitted to document his reduction in rate. He was assigned marginal marks of 3.0 in the rating categories of "military bearing" and "personal behavior." All other traits were marked 4.0, but a prior recommendation for advancement was withdrawn. The evaluation noted that he had been awarded his second Navy Achievement Medal and opined that he remained a valuable asset with unlimited potential.

g. On 11 November 1995 a medical officer noted in the medical record that that he had been following Petitioner for depression and other life issue problems. His recent alcohol incident was noted as part of his visits. The medical officer stated "Patient is not alcohol dependent or a routine abuser by

my assessment, but agree that level II treatment referral for this patient is indicated." CAAC records reflect that on 5 January 1996 it was contacted by the command master chief (CMC) and instructed to prepare paperwork for Petitioner to attend level III treatment. Thereafter, Petitioner contacted the drug and alcohol abuse program advisor (DAPA) and adamantly refused to attend level III treatment.

h. On 5 February 1996, Petitioner was referred for a psychiatric evaluation and a second opinion regarding his need for treatment. The examining psychiatrist opined that "at the present time I do not believe that he is suffers from alcoholism per se, but it is obvious he is not able to control his behavior once he starts drinking. I encourage him to go along with whatever treatment program is outlined for him..."

i. On 15 February 1996, Petitioner was advised that he was evaluated as being an alcohol abuser and told that anyone who refused to participate or cooperate in the rehabilitative or aftercare process, or incurs a subsequent "alcohol incident" may be processed for administrative separation. Petitioner elected to refuse treatment.

j. Petitioner was referred to level III residential treatment on 6 March 1996 as a result of threats made in December 1995 to kill himself and his wife if she sought a divorce. The Alcohol Rehabilitation Center clinical summary noted that as a result of the foregoing incident Petitioner was admitted to a veterans' hospital for suicidal/homicidal ideation and major depression. In January 1996, Petitioner was re-evaluated by the Mental Health Department and received diagnoses of alcohol dependence, a single episode of major depression, and attention deficient hyperactivity disorder. Although he did not accept these diagnoses, he asserted that he would remain alcohol free during the course of his treatment. However, on the weekend of 17 March 1996, during a routine breathalyzer check, Petitioner registered a BAC of .01. A blood test two hours later was negative and he was given the benefit of doubt because he denied having anything to drink. However, during the course of treatment, Petitioner reported having difficulty with unresolved grief regarding the loss of his rank and the impending loss of his marriage through divorce. He was discharged on 18 March 1996 with a continuing care plan in support of his sobriety, but the prognosis for his future sobriety was considered poor.

k. On 3 April 1996, Petitioner was notified that discharge was being recommended by reason of misconduct due to commission of a serious offense and alcohol abuse rehabilitation failure. He objected to the discharge and elected to be represented by counsel and to present his case to an administrative discharge board (ADB).

l. Petitioner appeared before an ADB with counsel on 15 August 1996. The ADB heard testimony from Petitioner and his wife; the CO's secretary; his assistant department head, LCDR P; his supervisor, HMC E; an MS1 B; the command DAPA; and the head of biomedical engineering, HMC B.

m. Petitioner's wife testified to the effect that they were having marital problems and she was awaiting her final divorce; they had been involved in a fertility group at the university for nearly six months, but were unable to complete it because the command sent her to Cuba for four months; the deployment put a strain on their marriage; and Petitioner was angry at the command for sending her on deployment when there were other people who could have been sent in her place. She stated that he volunteered to go, and another chief wanted to go to enhance her career. She asserted that the strain on their marriage had nothing to do with alcohol and she did not believe her husband was alcohol dependent. She opined that her husband was ordered to level III treatment for this single incident because it was easy to blame alcohol dependence for the incident.

n. The CO's secretary testified, in pertinent part, that she had known both Petitioner and his wife for some time and they were trying to have children, but were unable to complete a fertility program because the command deployed his wife to Cuba. She alleged that patient confidentiality was non-existent in this matter because Petitioner's doctor would tell people what was going on with him. She opined that their marital problems did not simply stem from alcoholism or domestic problems, but also due to command involvement to ensure they split up. She claimed that CMC was adamant in pushing for Petitioner's discharge. She intimated that there were rumors that the CMC was having an affair with Petitioner's wife, the CMC believed Petitioner was responsible for the rumors, and this may have been the reason the CMC was pushing for discharge. She also noted that Petitioner had asked the CO for early retirement since the chiefs he worked for had given him a good evaluation, but the CMC changed the evaluation to one in which he was not recommended for retention.

o. LCDR P testified that he been assistant department head for Petitioner for about two years and that he was a stellar performer. During working hours, he never smelled alcohol on Petitioner, he was an asset to Navy, and was recommended for retention.

p. MS1 B testified that he had substantial social contact with Petitioner over the past two years at softball games. He claimed he never saw Petitioner consume any alcohol at these games even though it was available. Petitioner's supervisor, HMC E, testified that Petitioner always gave 110% and was a "go-getter." When he was handed Petitioner's performance evaluation, HMC E remarked that it was not the one submitted up through the chain of command. He stated Petitioner had been marked at least 4.0 in some areas and possibly 5.0. He claims that the master chief had marked him low for not being a team player because he failed to complete level III treatment. HMC E stated that he and another HMC went to the CO to speak in Petitioner's behalf to ensure that he could stay in the Navy. They were basically told that since he did not complete level III, he would not be retained. The following day, he got an E-mail from the CMC stating he did not appreciate the chiefs' community going behind his back to the CO. He opined that Petitioner did not have an alcohol problem but did have an anger problem. In response to questions by the board, he stated that Petitioner would be put in for another Navy Achievement Medal.

q. The DAPA testified in pertinent part as to the criteria that had to be met to be deemed alcohol dependent. He could not answer why the CMC contacted the DAPA in this case, rather than the psychiatrist contacting the DAPA. The psychiatrist was of the opinion that Petitioner needed level III treatment but, to the best of the DAPA's knowledge, did not provide any documentation supporting this recommendation. HMC B testified that he had a working relationship with Petitioner in staff education and training, and Petitioner was an outstanding worker. He stated that he was on the disciplinary review board before Petitioner went to NJP, and believed that Petitioner was given bad advice prior to that board in that he should have remained silent. He asserted that Petitioner had great potential for further service, and had attended many social function with Petitioner and never saw him drink alcohol. To his knowledge, Petitioner was not alcohol dependent.

r. Petitioner testified at length regarding his marital problems, the fertility treatment program he and his wife were in, and the circumstances surrounding the incident which led to his NJP. He stated that the CMC told him if he did not go to level III he would be discharged from the Navy. He stated that while in treatment he asked if he had to admit that he was alcoholic and was told "Yes". He said he called the CMC and told him he would be lying if he admitted to being alcoholic. The CMC told him not lie but to be honest with himself. He called the CO, and the CO told him to tell them he was having problems with his wife. Petitioner admitted to having anger and jealousy problems, said that he had no control over his wife, and knew that she was being "hit on" because she was an attractive lady. Petitioner noted he was ineligible for retirement under TERA because he was not recommended for retention on his last evaluation.

s. In response to an inquiry by Petitioner's counsel, the senior member stated that during deliberation he had called the alcohol rehabilitation center in Jacksonville and spoke to a psychologist. The purpose of his call was to clarify if it was possible to complete level III without an admission that one is dependent upon alcohol. He was told that the individual must "be in acceptance of their disorder." He asked if acceptance of their disorder meant that they had to say "I am dependent upon alcohol?" The psychologist replied "No, the wording is not what we are looking for. It is the spirit under which it is said." Patients can say something in the nature of that they have a "pathological relationship with a alcohol" and that would satisfy.

t. The ADB by a vote of 3-0 found Petitioner had committed misconduct due to commission of a serious offense and alcohol abuse rehabilitation failure. The ADB recommended separation under other than honorable conditions, but that the discharge be suspended for 12 months.

u. Petitioner's counsel filed a letter of deficiency to the ADB. Counsel noted that an ADB had initially been held on 20 June 1996 but was terminated due to the malfunction of recording equipment. Counsel stated Petitioner was further prejudiced during the second ADB when the senior member took it upon himself to call a psychologist to inquire about Petitioner's level III treatment. The senior member did not inform anyone of his intentions, and counsel asserted that Petitioner was prejudiced because of this ex-parte communication

because he was not given an opportunity to question the individual.

v. On 10 September 1996, the CO did not concur with the ADB's recommendation to suspended the discharge for 12 months and made no comment on the deficiencies cited by Petitioner's counsel. The CO recommended that Petitioner be administratively separated by reason of alcohol abuse rehabilitation failure with the type of discharge warranted by the service record. Thereafter, the Chief of Naval Personnel (CNP) directed discharge by reason of misconduct. Petitioner was honorably discharged on 18 October 1996. His DD Form 214 shows that he had nearly 16 years of active service when he was discharged.

w. Prior to Petitioner's discharge, a physical evaluation board recommended that the CMC be placed on the Temporary Disability Retired List (TDRL) because of a medical problem with his right eye. Thereafter, CNP approved a request for permanent limited duty status until his approved Fleet Reserve date of 30 April 1997, cancelled his application for transfer to the Fleet Reserve, and issued retirement orders effective 30 April 1997. Subsequently, the CO approved the CMC's requests to go home to await orders, effective 31 December 1996; permissive temporary duty (PTDY) orders for 20 days, from 26 January to 14 February for the purpose of house/job hunting; and 73 days of leave from 15 February to 29 April 1997.

x. On or about 28 July 1997, the CMC became a party to a Navy Inspector General (IG) investigation. As a result of this investigation the CMC was required to reimburse the government in the amount of \$6,133.67 for 25 days of his period at home awaiting orders, from 31 December 1996 to 25 January 1997, and 20 days of permissive temporary duty orders for house/job hunting from 26 January to 14 February 1997; neither of which was authorized by regulation. The CO was issued a letter of instruction for his poor judgment in this matter.

y. Petitioner contends that discharge by reason of misconduct was inappropriate and could not have been accomplished without flagrant disregard of regulations and policies. He argues that the incident which resulted in NJP did not meet the established standards for serious misconduct. He further argues that in order to be separated for alcohol abuse rehabilitation failure it must be shown that the individual had a lack of potential for continued naval service, and demonstrated an inability or refusal to participate in,

cooperate in, or successfully complete a level II or III rehabilitation program. He asserts that the CO ignored example after example of outstanding potential provided in sworn testimony before the ADB. He further argues that alcohol rehabilitation failure should have not have been an issue, because without a valid assessment that a member lacks potential for continued naval service, failure to complete treatment is not, in itself, a reason for separation. Petitioner's also provided a copy of the foregoing IG investigation to show that the CO failed to follow naval regulations and instructions, thus resulting in disparate treatment of sailors within his command. He also provides a statement from Department of Veterans Affairs psychiatrists that he is being treated for a major depressive disorder.

z. Petitioner's former wife provides a statement in support of his application which reiterates much of the foregoing regarding their participation in an infertility group approved by the command, and the stress the deployment placed on their marriage.

aa. At enclosure (1), an advisory opinion from the Enlisted Performance Branch (Pers-832), Navy Personnel Command recommends favorable action in this case. The opinion notes that although Petitioner was properly processed for administrative separation in accordance with applicable directives, his one incident of misconduct and other domestic issues were mishandled by the command to some degree. It was obvious from the record that Petitioner was an outstanding performer and did possess potential for further useful service. He was determined to be alcohol dependent by some medical professionals but not by others, and it was odd that this case went as far as it did. Testimony at the ADB revealed a person who was not a habitual drinker. Marital discord created a one-time incident which, although serious, should not have been a career ender. The opinion also notes that it was unfortunate that the Navy was still downsizing at that time and more favorable consideration for his retention was not entertained. The CO wanted Petitioner's immediate discharge even though the ADB recommended a suspended other than honorable discharge. The opinion noted that Pers-83 granted some concession by authorizing the honorable discharge recommended by the CO. However, the opinion expressed the belief that the political climate revolving around the CO and the CMC dictated the outcome and specifically noted that in unrelated actions, the CMC became a party to an IG investigation in which he was required to

reimburse the government, and the CO was issued a letter of instruction for allowing inappropriate activity. The advisory opinion states that as a result, the judgment and motivation of both of these individuals becomes somewhat suspect.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants favorable action. In this regard, the Board essentially concurs with the comments contained in the advisory opinion. The Board particularly notes that during nearly 16 years of active service, Petitioner was consistently rated as outstanding and had been marked a perfect 4.0 in all categories since May 1993. Except for the single NJP of 1 November 1995, he has no other blemishes on his record, and he has been awarded the Navy Achievement Medal twice for his superior performance of duty.

While the Board does not condone the misconduct which led to his referral to alcohol abuse rehabilitation treatment and his subsequent discharge for misconduct, the evidence clearly indicates that this single incident of misconduct was not just the result of alcohol abuse, but was the culmination of ongoing domestic issues which were exacerbated by the command's decision to send Petitioner's wife on a four-month deployment while they were involved in a fertility group. Despite the frustrations this absence may have caused, Petitioner's performance of duty never wavered. It appears to the Board there was some inappropriate command involvement in their marital affairs. Testimony at the ADB testimony indicates Petitioner's wife confided intimate details of their domestic problems to the CMC because of her friendship with him and his wife. As a result, the Board believed this created an unfair bias against Petitioner since this information was used by the CMC, without Petitioner's wife's permission, to convince the CO that Petitioner had an alcohol problem. The Board found it significant in this case that all medical professionals were in agreement that Petitioner was not alcohol dependent. It also appears to the Board that the CMC knew Petitioner would not agree to alcohol rehabilitation treatment, and that such a refusal would be an expedient way to discharge him.

The Board particularly notes the lapse in judgment of the senior member of the ADB when, during a recess, he contacted a clinical psychologist at the alcohol rehabilitation center. This contact was inappropriate and prejudicial to Petitioner,

and denied him an opportunity to question the individual contacted by the senior member. However, despite this violation of procedures, the ADB members apparently recognized that the evidence strongly showed he had unlimited potential for further service and voted to suspend the discharge for 12 months to allow him the opportunity to show that he had no alcohol problem and that the misconduct was an aberration. The Board also notes that Petitioner's former CO and CMC were the subjects of an IG investigation for inappropriate conduct which could be considered more egregious than the misconduct which led to Petitioner's discharge.

The Board notes that Petitioner's is forever stigmatized by his last period of service, and Board believes that discharging him without any compensation for his nearly 16 years of outstanding service when he expressed a desire to transfer to the Fleet Reserve under TERA was unduly severe. The Board does not believe this single instance of misconduct, although serious, warranted termination of his career, and concludes that it would be appropriate and just to show that he was not discharged by reason of misconduct but was transferred to the Fleet Reserve under TERA.

The Board found no basis for granting Petitioner's request that he be placed on the Permanent Disability Retired List.

RECOMMENDATION:

a. That Petitioner's naval record be corrected by showing that he was not discharged by reason of misconduct on 18 October 1996 but continued to serve until he was released from active duty on 31 October 1996 and transferred to the Fleet Reserve under TERA, effective 1 November 1996.

b. That no further relief be granted.

c. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

d. That any material directed to be removed from Petitioner's naval record be returned to the Board together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross references being made a part of Petitioner's naval record.

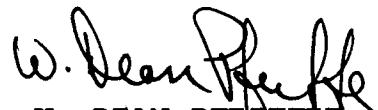
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder



ALAN E. GOLDSMITH
Acting Recorder

5. Pursuant to the delegation of authority set out in Section 6 (e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6 (e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.



W. DEAN PFEIFFER
Executive Director